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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 80-6780

WILLIAM THOMAS HUMPHREY, Petitioner,

-vs-

STATE OF OKLAHOMA, et al, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Submitted pro se
by Petitioner,

William Thomas Humphrey
Box 7000-E 23094-157
Texarkana, Texas 75501

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

WILLIAM THOMAS HUMPHREY, Petitioner,

-vs-

STATE OF OKLAHOMA, et al, Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 8, 1981.

CITATIONS TO OPINIONS BELOW

The orders of the United States Tenth Circuit Court of Appeals is an unpublished case and shown herein as Appendix "B", p. 6.

The orders and judgement of the United States District Court for the Eastern District of Oklahoma is an unpublished order and shown herein as Appendix "C", p. 7,8,9,10.

The unpublished orders of the Oklahoma Court of Criminal Appeals in post conviction proceedings are shown herein as Appendix "D", p. 11.

The unpublished orders of the Oklahoma Court of Criminal Appeals in the direct appeal are submitted herein as Appendix "E", p. 12 & 13.

The unpublished orders of the Pushmataha County District Court in post conviction proceedings are shown herein as Appendix "F", p. 14,15, 16, 17, 18.

JURISDICTION

The judgement of the Circuit Court of Appeals was entered on May 8, 1981. (Appendix B, p. 6) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)(3) and the Fifth Amendment.

QUESTIONS PRESENTED

(1) Whether defendant/petitioner is guilty, pursuant to the "reasonable doubt doctrine," of the crime of "Larceny of Domestic Animals" in light of his proof of purchase of same animals which was presented in

State post conviction proceedings but was not presented in the trial proceedings?

(2) Whether, in federal habeas corpus proceedings, the Due Process Clause of the Fifth Amendment requires a federal district court to consider favorable defense evidence that was presented in State post conviction proceedings, but was not presented at trial, when the court is called upon to apply a constitutional standard to a state case?

STATUTES INVOLVED

The Oklahoma conviction was found under Oklahoma Statute 21 O.S. Section 1716 and reproduced herein in Appendix "A", p. 5.

Federal habeas corpus proceedings were conducted pursuant to 28 U.S.C. Section 2254 which is reproduced herein in Appendix "A", p. 5.

STATEMENT

Petitioner was convicted for the crime of "Larceny of Domestic Animals" (21 O.S. Section 1716) in Pushmataha County District Court in Antlers, Oklahoma on evidence that he had sold eight (8) head of cattle in Sallisaw, Oklahoma on March 11, 1978 that had been stolen from one Jack Tucker in Pushmataha County Oklahoma on or about March 10, 1978. No evidence was presented by the State at trial to support who, the defendant or anyone else, actually committed the actual theft. The defense presented one eyewitness who testified that the defendant purchased the same cattle for a price of $1,500 in Leflore County Oklahoma on the morning of March 11, 1978, about 30 miles from where he sold them in Sallisaw, Oklahoma.

At no time did the defendant attempt to deny the sale of these cattle and only told authorties that he bought the cattle and could prove his legal purchase through witnesses, and that he had sold them in his true name.

At trial the defense attorney did not produce the defendant's receipt for his purchase of the cattle before the jury or trial court but relied solely on the contention that no theft charges could be found in light of only the State's proof of the sale by him. The jury returned a finding of guilty and imposed a 10 year sentence. The Oklahoma Court of Criminal Appeals affirmed the conviction with one justice dissenting. (Appendix "E", p. 12, 13)

Petitioner filed a pro se petition for post conviction relief (Appendix "G", p. 19,20,21,22,23,24,25) which was denied by the Pushmataha

County District Court. (Appendix "F", p. 14,15,16,17,18) In the post conviction petition the receipt for the purchase of the cattle for $1,500 was submitted with two eyewitnesses' affidavits supporting the good-faith purchase. (See p. 22,23, 24, herein). The denial was appealed to the Oklahoma Court of Criminal Appeals and also denied as shown herein in Appendix "D", p. 11.

Federal habeas corpus action, pursuant to 28 U.S.C. Section 2254, was filed in the United States District Court for the Eastern District of Oklahoma contesting the sufficiency of the overall evidence in light of both the trial proceedings and the receipt of purchase shown in state post conviction proceedings, pursuant to the "reasonable doubt doctrine" set out by this Court in Jackson vs Virginia, 443 U.S. 307 (1979). Petitioner argued that his proof of purchase shown in state post conviction proceedings (the receipt and supporting affidavits) supported his innocence of the theft and prayed for a reversal of the conviction. The State of Oklahoma has never contested nor disputed the petitioner's proof of the $1,500 purchase of these cattle.

In its Memorandum Opinion the district court did not remotely acknowledge nor comment in regards to the defendant's proof of purchase of the cattle that was submitted in state post conviction proceedings, and further, did not hold an evidentiary hearing to make a fctfinding; just ignored the post conviction evidence and denied the petition. (Appendix "C", p. 7,8,9,10.) The judgement was appealed to the Tenth Circuit Court of Appeals and was subsequently denied, thus affirming the district court's findings.(Appendix "B", p. 6).

REASONS FOR GRANTING THE WRIT

(1) Whether defendant/petitioner is guilty, pursuant to the "reasonable doubt doctrine" of the crime of "Larceny of Domestic Animals" in light of his proof of purchase of same animals which was presented in State post conviction proceedings but was not presented in the trial proceedings?

In the federal habeas corpus proceedings both the trial evidence and and the post conviction evidence, showing proof of purchase, were submitted for review. Petitioner contends that in light of proof of purchase shown in post conviction, which erased any inference of the theft, this case should be reversed pursuant to the teachings of Jackson vs Virginia, 443 U.S. 307 (1979). Perhaps petitioner, by his possession and sale of these animals, is guilty of "possession or sales of stolen animals" under Oklahoma law but to hold him guilty of the actual theft, when he has proven otherwise and his proof is undisputed, is contrary to the teachings of Mullaney vs Wilbur, 421 U.S. 684 at 697-698 (1975. Also Winship, 397 U.S. 358 (1970).

Admitted, Petitioner unknowingly sold these same stolen cattle but absolutely no evidence has ever been presented to support the actual theft, which he is charged with, simply because there is none due to the facts submitted by petitioner in post conviction showing the circumstances of the theft, which is undisputed at this time. If in fact petitioner is guilty of a crime it is his failure to produce this evidence at trial.

(2). Whether, in federal habeas corpus proceedings, the Due Process Clause of the Fifth Amendment requires a federal district court to consider favorable defense evidence that was presented in State post conviction proceedings, but was not presented at trial, when the court is called upon to apply a constitutional standard to a state case?

The United States District Court for the Eastern District of Oklahoma did not remotely make a finding of guilt pursuant to the "reasonable doubt doctrine" defense which clearly included evidence presented in the Oklahoma state courts. Petitioner moves this Court to make a finding whether the Due Process Clause requires the federal courts to assess all the historical facts of this case when called upon to apply a constitutional standard to this conviction obtained in a state court. Jackson vs Virginia, supra, and In re Winship, supra,. In this case, the federal district court based its final judgement only on the facts presented at trial when it was called upon to assess the favorable evidence presented in post conviction proceedings also. Petitioner contends, strongly, that he has not been allowed due process by his favorable evidence being ignored by the lower Courts and further that he did not commit the crime of "Larceny" concerning these animals and that his proof has gone unnoticed and undisputed in the lower courts.

CONCLUSION

For the foregoing reasons Petitioner moves this Court to grant this Petition for Writ of Certiorari in light of Haines vs Kerner, 404 U.S. 519 (1972) and because he is not guilty as charged.

Respectfully submitted

William Thomas Humphrey

William Thomas Humphrey pro se
Box 7000-E 23094-157
Texarkana, Texas 75501

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of this Petition to Mr. Jan Eric Cartwright, Oklahoma Attorney General, 112 State Capitol Building, Oklahoma City, OK 73105 this 27th day of May, 1981.

William Thomas Humphrey

William Thomas Humphrey

STATUTES INVOLVED

"LARCENY OF DOMESTIC ANIMALS"
(21 O. S. Section 1716)

"Any person in this state who shall steal any horse, jackass, janet, mule, cow, or hog shall be guilty of a felony . . . ."

"STATE CUSTODY; REMEDIES IN FEDERAL COURTS"
(28 U.S.C. Section 2254)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court only on the grounds that he is in custody in violation of the constitution or laws or treaties of the United States.

VERIFICATION

Petitioner, WILLIAM THOMAS HUMPHREY, hereby swears according to law that he is the party seeking relief in this action and that all statements made herein are based upon fact and of his belief that they are true. He further states that he is a prisoner of the United States incarcerated at the Federal Correctional Institution at Texarkana, Texas 75501 and his mailing address is P.O. Box 7000-E, FCI #23094-157.

This document is signed pursuant to the provisions of 28 U.S.C. Section 1746 this 27 day of May, 1981.

William Thomas Humphrey
William Thomas Humphrey

MARCH TERM - May 8, 1981

Before Honorable James E. Barrett, Circuit Judge, United States Court of Appeals

WILLIAM THOMAS HUMPHREY, Petitioner-Appellant, v. STATE OF OKLAHOMA and the ATTORNEY GENERAL of the State of Oklahoma, Respondents-Appellees.	)	No. 81-1401

This matter comes on for consideration of appellant's motion to proceed on appeal in forma pauperis which is additionally construed as an application for a certificate of probable cause. 28 U.S.C. § 2253; Fed. R. App. P. 22.

Upon consideration thereof, the motion and application are denied. The district court's conclusion, stated in the Memorandum Opinion filed March 30, 1981 and which finds sufficient evidence to support the conviction, was correct. See Jackson v. Virginia, 443 U.S. 307 (1979).

HOWARD K. PHILLIPS, Clerk

By: Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

"6"

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

WILLIAM THOMAS HUMPHREY,

Petitioner,

v.

STATE OF OKLAHOMA and the ATTORNEY GENERAL, State of Oklahoma, (Tom Martin, Warden, FCI, El Reno),

Respondents.

No. 80-400-C

FILED

MAR 30 1981

LEWIS L. VAUGHN
CLERK, U. S. DISTRICT COURT
BY _____ DEPUTY CLK

J U D G M E N T

IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED that the Petition for Writ of Habeas Corpus is denied for the reasons given in the Memorandum Opinion filed of even date.

DONE this 30th day of March, 1981.

UNITED STATES DISTRICT JUDGE

"7"

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

WILLIAM THOMAS HUMPHREY,

Petitioner,

v.

STATE OF OKLAHOMA and the ATTORNEY GENERAL, State of Oklahoma, (Tom Martin, Warden, FCI, El Reno),

Respondents.

No. 80-400-C

FILED

MAR 30 1981

LEWIS L. VAUGHN
CLERK, U. S. DISTRICT COURT
BY _____ DEPUTY CLERK

MEMORANDUM OPINION

This is a proceeding initiated by the above named petitioner, who is a federal prisoner incarcerated at the Federal Penitentiary in El Reno, Oklahoma. He claims that the detainer filed by the State of Oklahoma pursuant to the judgment and sentence of the Pushmataha County, Oklahoma District Court, following his jury trial where he was convicted on November 9, 1978, in Case No. CRF-78-19, is unlawful. Petitioner alleges the following:

(1) "The record of this case does not support a conviction of 'larceny of domestic animals' beyond a 'reasonable doubt' as required by the Fifth Amendment and imposed upon the State via the Fourth Amendment."

(2) "The District Court and the Oklahoma Court of Criminal Appeals refused to appoint legal counsel for post-conviction proceeding."

The respondent has filed a response by and through the Attorney General of the State of Oklahoma. In addition, the respondent has filed a motion to dismiss, requesting that the Court dismiss the Attorney General as a respondent in this matter pursuant to the provisions of Rule 12 (b)(6) of the Federal Rules of Civil Procedure. The Court also notes that the respondent has submitted all of the trial and appellate records associated with this matter, which said records include the trial transcript of petitioner's trial held before the Pushmataha County, Oklahoma District Court.

"8"

The Court has also considered petitioner's reply to respondent's motion to dismiss and petitioner's reply to respondent's response. The Court notes in petitioner's reply to respondent's motion to dismiss that petitioner concedes that the Attorney General is not a necessary party to the determination of this action, and this Court thus finds and orders that Attorney General Jan Eric Cartwright is hereby dismissed as a party respondent.

The Court further notes that the respondent and petitioner agree that all state remedies have been exhausted. Petitioner's Propositions I and II will be considered separately unless otherwise indicated.

PROPOSITION I

> THE RECORD OF THIS CASE DOES NOT SUPPORT A CONVICTION OF "LARCENY OF DOMESTIC ANIMALS" BEYOND A "REASONABLE DOUBT" AS REQUIRED BY THE FIFTH AMENDMENT AND IMPOSED UPON THE STATE VIA THE FOURTH AMENDMENT.

This Court has reviewed the entire trial transcript as well as all files and records associated therewith and after said review finds, that the trial record does contain sufficient evidence to support the conviction of the petitioner. In addressing the question of sufficiency of evidence to support a criminal conviction, the Supreme Court, in Jackson v. Virginia, et al, 433 U.S. 307, 319 (1979), stated:

> "The relevant question is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt."

A review of this case in the light most favorable to the prosecution shows not only was there an eye-witness who identified the petitioner as the person who sold the stolen cattle in question, there was also a clear identification of said cattle by the owner of the cattle. In addition, there was strong circumstantial evidence that defendant's vehicle was placed at the scene of the crime. Therefore, it is abundantly clear that the jury could have found the petitioner guilty beyond a reasonable doubt of the crime charged in the indictment. Moore v. Duckworth, 443 U.S. 713 (1979).

PROPOSITION II

THE DISTRICT COURT AND THE OKLAHOMA COURT OF CRIMINAL APPEALS REFUSED TO APPOINT LEGAL COUNSEL FOR POST-CONVICTION PROCEEDING.

Contrary to the allegations of petitioner, the trial court did appoint an attorney for petitioner for the purpose of assisting him with his appeal of the trial court's denial of post-conviction relief. (See Amended Petition in Error filed September 23, 1980 and Brief filed in support of Amended Petition in Error filed on September 23, 1980, both in Case No. PC-80-576.) 12 O.S. 1082 indicates that the trial court has discretion as to whether to appoint counsel for post-conviction relief matters. The Oklahoma Court of Criminal Appeals, in Grimes v. State, Okl. Cr., 512 P.2d 235 (1973), held that defendant's constitutional right to counsel was not denied by reason of his not being assigned counsel for application for post-conviction relief where trial court did not find application meritorious, but did appoint counsel for appellate purposes. This Circuit has long held that the interpretation of state statute by the highest court of the state will be followed by federal courts unless that interpretation is not consistent with the basic principles of liberty and justice. Tyrrell v. Crouse, 422 P.2d 852, 853 (10th Cir. 1970); Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968). This Court specifically finds that the procedure used by the trial court is not inconsistent with the basic principles of justice because the only issue of substance raised by petitioner is the question of whether there was sufficient evidence to support petitioner's conviction, all of which was fully dealt with under Proposition I.

Accordingly, the petition for writ of habeas corpus is denied.

ORDERED this 30th day of March, 1981.

Harold Heaney

UNITED STATES DISTRICT JUDGE

"10"

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 24 1980
Ross N. Lillard, Jr.
CLERK

WILLIAM THOMAS HUMPHREY, Appellant,

vs.

STATE OF OKLAHOMA, Appellee.

NO. PC-80-576

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

William Thomas Humphrey has appealed to this Court in accordance with 22 O.S. 1971, Sec. 1087, from the denial of his application for post-conviction relief by the District Court, Pushmataha County, in Case No. CRF-78-19. However, everything raised, both in the appellant's pro se brief and in the brief of his attorney, pertains to the sufficiency of the evidence introduced against the appellant at his trial; and that issue was settled by this Court in the appellant original appeal from his conviction: Humphrey v. State, Okl.Cr., F-79-267 (April 3, 1980).

IT IS THEREFORE THE ORDER OF THIS COURT that the order of the District Court denying post-conviction relief should be, and the same hereby is, AFFIRMED.

WITNESS OUR HANDS, and the seal of this Court, this 24th day of October, 1980.

TOM R. CORNISH, PRESIDING JUDGE

TOM BRETT, JUDGE

HEZ J. BUSSEY, JUDGE

ATTEST:

CLERK

"11"

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

APR 3 1980
Ross N. Lillard, Jr.
CLERK

WILLIAM THOMAS HUMPHREY,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

No. F-79-267

NOT FOR PUBLICATION

AUTHORIZED FOR FILING
8 APR 1980
COURT OF CRIMINAL APPEALS

- O P I N I O N -

CORNISH, Presiding Judge:

William Thomas Humphrey was convicted for the offense of Larceny of Domestic Animals in the District Court of Pushmataha County, Case No. CRF-78-19, and sentenced to ten (10) years' imprisonment. His only complaint on appeal is that the evidence was insufficient to support the verdict and that the trial court should have sustained his motion for a directed verdict.

In reviewing a trial court's ruling on a motion for a directed verdict, we look at the State's evidence, and then only to see if a prima facie case was established. If a prima facie case was presented, then the trial court acted correctly in overruling the motion for a directed verdict, and all questions of fact were for the trier of fact to settle.

In this case, the State proved that Jack Tucker, a rancher, lost eight steers. On March 10, 1978, the steers were on his ranch in Pushmataha County, and on March 12 they were discovered missing. Investigation revealed that on March 11 the appellant sold Mr. Tucker's cattle at the Sallisaw Sale Barn. The appellant said he was driving along the road and came upon a pickup and trailer that had broken down about 20 miles from the sale barn. He purchased the cattle for $1,500.00 from an unknown man and took them to the sale.

We believe that there was sufficient evidence to submit the case to the jury. It is true that in Underhill v. State, 70 Okl.Cr. 39, 104 P.2d 447 (1940), we said that mere possession of stolen property, without more, would not support a conviction for the

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theft of the goods. However, in this case, considering the time factor and the story the appellant told investigators, we uphold the ruling of the trial court in submitting the case to the jury.

The judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT, PUSHMATAHA COUNTY, OKLAHOMA, HONORABLE NEAL HARRIOTT, JUDGE.

WILLIAM THOMAS HUMPHREY, appellant, was convicted of the offense of Larceny of Domestic Animals; was sentenced to ten (10) years' imprisonment, and appeals. AFFIRMED.

ROBERT S. SETTLES,
ANTLERS, OKLAHOMA,
Attorney for Appellant.

JAN ERIC CARTWRIGHT,
ATTORNEY GENERAL,
WILLIAM S. FLANAGAN,
ASSISTANT ATTORNEY GENERAL,
MICHAEL BARDRICK, LEGAL INTERN,
Attorneys for Appellee.

OPINION BY CORNISH, P. J.
BUSSEY, J., CONCURS
BRETT, J., DISSENTS

BRETT, J., DISSENTING:

I respectfully dissent to this decision for the reason the proof offered at trial would sustain a charge of Possession of Stolen Property, but I do not believe it would sustain a charge of Larceny of Domestic Animals.

/13"

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IN THE DISTRICT COURT
Pushmataha County, Okla.
FILED
AUG 05 1980
KATHY CHAPMAN, Court Cl
By_____Dep

IN THE DISTRICT COURT OF PUSHMATAHA COUNTY

STATE OF OKLAHOMA

William Thomas Humphrey
Petitioner

-vs-

State of Oklahoma
Respondent

CRF-78-19
(Post conviction relief)

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

The Petitioner filed his application for Post-conviction Relief on April 21st, 1980. Petitioner was furnished with forms with which to file such application pursuant to Rule 4.6 of the Court of Criminal appeals and given thirty (30) days in which to submit such application. Such application was returned in proper form on April 24th, 1980. The States Response and Motion to Dismiss was filed on May 29th, 1980. On June 3rd, 1980, the Petitioner filed his Response to the States Motion to Dismiss.

The issues upon the Application being joined, and upon a determination that the appointment of counsel is not necessary to provide a fair determination of the petitioner's claims, the Court proceeds as follows:

The issues presented by the Petitioner appear to be: (1) insufficient evidence to support the conviction of Larceny of Domestic animals, (1st phase) (2) insufficient evidence to support the conviction of the above offense after Former Conviction of a Felony, (2nd phase), (3) a witness who would substantiate the alibi of the defendant, and (4) a reciept showing that defendant purhcased the stolen cattle from some third party.

The Petitioner additionally raised the issue of the constitutionality of Oklahoma's after Former Conviction of a Felony Statute.

It is determined that the Application may be disposed of on the pleadings and the record therefore an evidentiary hearing is not required. The

"14"

Court has examined all the pleadings and records contained in Case No. CRF-78-19 (Pushmataha County) as well as the trial transcript.

Findings of Fact:

The Petitioner, represented by counsel, was, on October 13th, 1978, convicted in a trial by jury of the offense of Larceny of Domestic Aminals After Former Conviction of a Felony (21 Okl. St. Ann. § 1716.) and his punishment fixed at ten (10) years in the Oklahoma State Penitentiary. The Petitioner was appointed counsel and an appeal was perfected. The Court of Criminal Appeals in F-79-267 affirmed such conviction on April 3rd, 1980.

The Court file reflcts that the Petitioner, prior to trial, issued subpcenas for Russel Transue, Talihina Chief of Police, D.G. Baker, & Deputy George Atchley. At the trial, one defense witness, Harvey Painter, was called by Petitioner.

At the time of trial, the Petitioner announced ready for trial and no motion for continuance was made.

Upon the Jury returning a verdict of Guilty in the first phase, the State called Gene Allen, Sheriff of Pushmataha County and offered State's Exhibit '13', a certified copy of the Judgment and Commitment Order of the United States District Court of the Eastern District of Oklahoma in Case No. 76-64-CR entitled United States of America vs. William Thomas Humphrey.

Conclusion of Law

As to the Petitioners first issue of there being insufficient evidence to support a conviction of Larceny, in Lemmon vs. State, 538. P. 2d 596, the Court of Criminal Appeals has held:

> "Mere Possession of missing property is not sufficient to convict defendant of Larceny, but where such fact is supplemented with substatial facts inconsistent with idea that defendat obtained goods in honest manner, it then becomes question of fact for jury to pass upon."

(c.f. Ainesworth vs. State, 537 P. 2d. 440 and Turman vs. State 522 P. 2d. 247

In Petitioner's case evidence was presented which placed the stolen cattle in

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"15"

the Petitioner's possession, that he sold the cattle within a matter of one day or less after the taking and that there was similarity between the tires on Petitioners truck and trailer and the tire prints found at the scene of the taking."

In the record of Petitioners trial there exists competent evidence from which the jury could reasonably and logically find the Petitioner guilty of Larceny. The weight and value of such evidence, together with credibility of the witnesses is solely the province of the jury. Ainesworth, supra.

As to the Petitioners contention that insufficent evidence was presented to convict Petitioner of Larceny After Former Conviction of a Felony; State's Exhibit '13' showed that in the U.S. District Court-Eastern District of Oklahoma on February 1st, 1977, William Thomas Humphrey was sentenced to two (2) years for the offense of Escape and at such time represented by counsel.

> "Identity of name is prima facie evidence of identity of a person and, absent rebutting testimony, is sufficient to establish a former felony conviction." Wilson vs. State, 568 P. 2d. 1323 (1977)

The Petitioner was identified as William Thomas Humphrey by the Sheriff, and no evidence rebutting either the Judgement and Commitment Order or the identity. There was competent evidence.

The Petitioners third issue concerns the affidavit of Thomas Howard Gilbreath (Petitioner Ex. "A"), the affiant states that a Jess Brown took certain cattle from near Clayton, Oklahoma, on March 11th, 1978, and after their pickup broke down at a truck stop, Jess Brown sold the eight (8) cattle to Petitioner for $1500.00.

The record doesn't reflect that the Petitioner subpoenaed this witness for trial even though the Petitioner had knowledge of this witness and his purported testimony, not does the record show any motion for a trial continance so the Petitioner might secure his witness. This does not reflect due diligence on the part of the Petitioner. Further, the evidence is merely cumulative, and

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there is no reasonable probability that this evidence would change the jury's results.

> "....evidence must be such that it could not have been discovered prior to trial and have probable effect on the verdict."
> Vickers vs. State, 538 P. 2d 1134

In Petitioner's case it is clearly shown that Petitioner had knowledge of this witness and testimony. Petitioner exercised his discretion and chose not to employ such witness.

The Petitioners fourth issue is a unique one. Petitioner's Exhibit "C" shows a purported receipt from Jess Brown to Petitioner dated March 11th, 1978, in the amount of $1500.00 for 'Eight cows'. Petitioners Exhibit "D", the affidavit of David Smith states that Petitioner gave Jess Brown two thousand ($2,000.00) dollars for the purpose of having Brown "fix" the pending charges and also that Petitioner to agreed not to utilize Brown's reciept (Petitioner Ex. 'C'), or to mention Brown's name at the Petitioners trial. This cannot be urged by Petitioner to be "newly discovered evidence", for is apparent that all of this wealth of information was known to Petitioner prior to trial. Having this knowledge and making the decision to withold this evidence and testimony at trial was solely the decision of the Petitioner. The Petitioners complaint seems to be that he paid good money to have this case fixed, it was not, he was convicted, and now he wants a second chance wherein he will now use the purported "Receipt." This whole issue is ridiculous.

The Petitioners final issue alleges the After Former Conviction of a Felony Statute to be unconstitutional for failure to accord Due Process.

In Thigpen vs. State, 571 P. 2d 467, the Court of Criminal Appeals ruled 21 OSA § 51 (B) unconstitutionally vague but held that the validity of 21 OSA 51 (A), under which Petitioner was convicted, was in no way impaired.

> "The 'habitual criminal act' does not invade the privileges and immunites of the citizen, does not deny equal protection of the law or due process, or constitute unjust discrimination or double jeopardy."
> Jump vs. Page, 437 P. 2d 283.

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See also Hill vs. State, 450 P.2d 235, Stidham vs. State, 503 P. 2d 905.

Having addressed each of the issues raised by Petitioner, it is the decision of this Court that such Application for Post-conviction relief should be, and hereby is denied.

Given under my hand this 5th day of August, 1980.

Lowell R. Burgess Jr.

JUDGE OF THE DISTRICT COURT

"18"

IN THE DISTRICT COURT FOR PUSHMATAHA COUNTY

STATE OF OKLAHOMA

WILLIAM THOMAS HUMPHREY, Petitioner,

-vs-

STATE OF OKLAHOMA, Respondent.

CRF-78-19

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PETITION FOR POST CONVICTION RELIEF

COMES NOW petitioner Tommy Humphrey, pro se, and moves this Court for Post Conviction Relief pursuant to applicable Oklahoma Statutes. This petition will show sufficient evidence and information to merit relief in this case and further, will show a colorful defense as to why this evidence was not presented at the time of the trial had in this cause. Petitioner deposes and shows the following in support:

CASE BACKGROUND AND BRIEF IN SUPPORT

On or about March 10, 1978 eight (8) steers were stolen from Mr. Jack Tucker in Pushmataha County. On March 11, 1978 this petitioner did buy these same eight steers in good faith for $1,500.00 cash at Sunset Corner, in Leflore County, and transport same steers to the Sallisaw Oklahoma Salebarn. No attempts were made to alter the brands and/or earmarkings and the steers were openly sold in the name of Tommy Humphrey. Two checks were issued to Tommy Humphrey by the Salebarn for these cattle. The reason for this was that petitioner had spent all his ready cash, plus borrowed additional money, for the cash purchase of the steers and he knew it would be difficult to cash a large check in Sallisaw over the weekend period. One check was for the price of only one steer and the balance placed on the large check for the price of the other seven steers.

Petitioner was subsequently arrested on April 11, 1978 and charged with larceny of domestic animals in Pushmataha County. On October 12, 1978 he was convicted by a jury in Pushmataha County District Court in the case. The conviction was appealed to the Oklahoma Court of Criminal Appeals and Mr. Robert S. Settles, Antlers, Oklahoma was appointed to perfect the appeal. One issue was raised on the appeal and that was that the District Court should have granted defendant's demurrer whereas the prosecution had failed to prove

the crime was committed by the defendant. Mr. Settles did present a colorful appeal and presented a strong argument, however the Appeals Court affirmed the conviction with Justice J. Britt dissenting,on April 3, 1980.

Several factors were considered prior to trial in this case. First, petitioner's attorney (Gerald Hunter) strongly suggested that he was charged under improper criminal Statutes and that little defense was necessary for this particular crime. Second, one main eyewitness could not be found prior to trial and most relevant, petitioner was the victim of a fraud scheme which led him to believe this case was "fixed" through influential friends of one Jess Brown,who had actually sold him the cattle in question.

Exhibit "A" tells the full story of how and when the cattle were sold to this petitioner at Sunset Corner on March 11, 1978. This eyewitness was not available on the date trial was had in this case but will gladly testify to the transaction as indicated by his Affadivit. Exhibit "B" supports the statements shown in exhibit "A" and it should be noted that these two witnesses do not know each other nor have they ever discussed this matter at any time.

Exhibit "C" shows the receipt written by Jess Brown to the petitioner for the cash sale of the aforementioned cattle. A copy of Brown's handwriting is also submitted to compare the writing as being the same. Exhibit "D" clearly explains why this receipt was not presented as a defense in the trial. As further support, Jess Brown openly admitted taking the fix money while under oath in United States District Court, case number 78-126-CR, Muskogee, Oklahoma, in January of 1979. While testifying, Brown admitted that he had caused this petitioner to believe he had Mafia contacts who would "fix" the Court in Antlers so that no conviction would ever be had in the cattle case provided the receipt shown in exhibit "C" was not used as a defense nor his name mentioned in the trial. The Federal Court transcripts will fully support this fact. This alleged fix in addition to the petitioner's attorney saying the case needed little defense resulted in the receipt and the full story being not presented in the trial.

Further, Harvey Painter, the single defense witness did not know Jess Brown's true name on October 12, 1978 and therefore did not correctly identify him when he testified in the trial. Again, the defense attorney strongly contended that it was not necessary to produce the seller whereas the investigators were obligated to produce him and that no crime could be proven against petitioner as he was charged.

Best Copy Available

CONCLUSION

The statements presented herein are all supported by sworn Affidavits by eyewitnesses who will testify in open court to these facts. All of the allegations mentioned concerning Jess Brown and his fraud-scheme to fix the case has been admitted by him in Federal Court and is recorded.

Further, no evidence was ever presented in the trial to hint that this petitioner stole Mr. Tucker's cattle. To the contrary, evidence was presented in the testimony of Sheriff Gene Allen, Deputy George Axley and Cattle Investigator Paul Wade that petitioner's only vehicle and stock trailer was not the equipment used to go in Mr. Tucker's field and steal the cattle.

Petitioner made no effort to conceal his identy at the sale barn because he honestly believed the cattle were simply cattle legally owned by Jess Brown prior to his good faith purchase.

In view of the evidence presented herein, petitioner respectfully moves this Court to dismiss this charge or to Order an new trial held at once to establish the true facts of the case. There can be little doubt that this petitioner is not guilty of the larceny of these cattle he recieved ten years in prison for.

The split decision by the Appeals Court, absent the presentation of the full facts, indicates relief is due and will be if these facts are finally shown to that Court.

As an alternative to a dismissal or a new trial, petitioner moves for a reduction to time served whereas if he were not in Federal custody serving twenty-one (21) years he would have been eligible for parole in the State Prison System by this time.

Respectfully Submitted

Tommy Humphrey

Tommy Humphrey, pro se
Box 1500 6-L
El Reno, OK 73036

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of this action to the Pushmataha County District Attorney, Antlers, Oklahoma 74523 this 18th day of April, 1980.

Tommy Humphrey

Tommy Humphrey

"21"

AFFIDAVIT

On or about March 10, 1978, Jess Brown approached me at my home in Oklahoma City to borrow my Ford pick-up and stock trailer, and stated that he had bought cattle in Pushmataha County, Oklahoma and had to haul them to a sale in Waldron, Arkansas on Saturday, March 11, 1978. I agreed to let him use my truck and trailer for $100.00 provided that I got to make the trip.

We arrived in Clayton, Oklahoma at about 4:00 AM and drove about five miles out of twon, turned left and crossed a bridge about two miles after leaving the highway. From there we went through a wire gate that Brown took wires off of rather than unlock the padlock on the gate. Once inside the pasture, Brown took out a 50 pound sack of feed and coaxed the cattle inside an old barn looking thing surrounded by a run down loading chute. He loaded eight (8) head on the trailer and we left before daylight with the cattle.

We went through Talihina, Oklahoma, on through Poteau, Oklahoma and the transmission in the truck started to slip. We got as far as a place called Sunset Corner before the truck completely stopped pulling. Seeing that we were stranded, I called my sister in Oklahoma City and had her bring another vehicle down to pull the trailer and to take us back to Oklahoma City.

About 8:30 or 9:00 AM Tommy Humphrey drove up pulling a stock trailer behind his pick-up and came in a cafe (Betty's Truck Stop) where Jess Brown and I were waiting. Brown asked Humphrey if he would haul the cattle to the sale in Waldron for him. Humphrey stated that he did not have time to make the drive but would consider buying the cattle if the price was right. After looking at the cattle, they settled on a price of $1500.00 and Humphrey paid Brown the $1500.00 in $100.00 bills or most of it was in $100.00 bills, I'm sure. Obviously, Humphrey did not have the full amount because he borrowed money from a friend of his who was at the truck stop.

Humphrey, Brown, and Humphrey's friend who loaned him the money, loaded the cattle off our trailer onto Humphrey's trailer and Humphrey drove off toward Sallisaw, Oklahoma.

At no time did Brown ever tell Humphrey or myself that the cattle were not in fact his own cattle and that he had stolen them. Humphrey paid for the cattle in good faith and Brown did give him a receipt. However, some two months later Brown told me that Humphrey was arrested but he felt sure that he (Humphrey) would not tell anyone who he had got the cattle from.

I hereby swear the foregoing is true and correct pursuant to Title 28 U.S.C. § 1746 this 1 day of February, 1980.

Thomas Howard Gilbreath

Thomas Howard Gilbreath
3416 S. Liberty
Oklahoma City, Oklahoma 73119

Authorized by the Act of July 7, 1955 to administer oaths (15 U.S.C. 4004)

Exhibit "A"

"29"

STATEMENT OF FACTS

On March 11, 1978 at Betty's Truck Stop, Sunset Corner in Leflore County, Oklahoma I personally witnessed Tommy Humphrey purchase eight (8) head of steers and pay a man $1,500.00 cash in good faith for these cattle. The man that sold the aforementioned cattle to Tommy Humphrey was later identified to me as Jess Brown, Howe, Oklahoma. At the time of the sale, Brown did write Humphrey a reciept for these cattle as the money was paid by Humphrey to Brown in good faith. I later testified to the transaction in State District Court in Antlers, Oklahoma. However, at the time I gave the testimony Jess Brown had not been identified to me.

Harvey Painter
Harvey Painter
P. O. Box 703
Panama, Oklahoma 74951

Being of sound mind and body and not under any form of threat or promise, I hereby affirm the above is true and correct under the provisions and penalities of Title 28 U.S.C. § 1746 this 11-14 day of 1979 1979.

Harvey Painter
Harvey Painter

Exhibit "B"

"23"

No. 126

DATE	SOLD TO	AMOUNT
MAY 11, 78	Tommy Humphrey	$1500.00 Cash

30 Cattle
Eight Cows .. Jess Brown

J. Brown
RH1 Box 233-E
Howe, Okla. 74940

HOWE
JUN
P.M.

Tommy Humphrey
23094-157 - 6L
P.O. Box 1500 F.C.I.
El Reno, Okla.
73036

Exhibit "C"

"24"

SWORN AFFADIVIT

STATEMENT OF FACTS

I was an eyewitness to the following act committed by Jess Brown on or about October 2, 1978 in the home of my mother Arvella Harris in Panama, Oklahoma, Leflore County, Oklahoma. Tommy Humphrey paid Jess Brown $2,000.00 in $100.00 bills in the presence of myself and my sister Lillie Walton. According to Jess Brown, this money was to be used for the purpose of having arrangements made by his personal friend to "Fix" pending charges pertaining to Tommy Humphrey in Antlers, Oklahoma concerning stolen cattle. This was also to be done or "Fixed" providing Humphrey agreed not to produce in court as a defense, a handwritten reciept from Brown for the stolen cattle mentioned in the Antlers case, nor to produce any evidence as a defense that implicated Jess Brown. This was all discussed by Brown and Humphrey prior to the exchange of the aforementioned $2,000.00 in front of the above named witnesses. Jess Brown did take and keep the $2,000.00 an the above mentioned date and leave the home of my mother with the money in his pocket.

Being of sound mind and body and not being under any form of threat or promise, I hereby swear under the penalities of Title 28 U.S.C. # 1746 that the foregoing is true and correct this 2nd day of November 1979.

David A. Smith
Box 1500
El Reno, Oklahoma 73036

[illegible] by the Act of [illegible] to administer oaths (18 U.S.C. 4004)

Arnold R. [illegible]
1/29/80

Exhibit "D"

"25"